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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NO. 84-951 (6)

GULF COAST CABLE TELEVISION CO.,
Petitioner,

v.

AFFILIATED CAPITAL CORP.,
Respondent.

SUPPLEMENTAL BRIEF FOR RESPONDENT IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WILLIAM H. WHITE
(Counsel of Record)
STEPHEN D. SUSMAN
MARK L. D. WAWRO
SUSMAN, GODFREY & MCGOWAN
2400 Allied Bank Plaza
Houston, Texas 77002
713/651-9366

Attorneys for Respondent,
Affiliated Capital Corporation.

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

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136

SUBJECT INDEX

	Page
I. THE BRIEF OF THE UNITED STATES CORRECTLY URGES THE COURT TO DECLINE REVIEW.	1
A. There Is No Split in the Circuits.	1
B. No Important Policy Justifies Review.	2
II. THE UNITED STATES INCORRECTLY CRITICIZES APPLICATION OF THE LAW TO THE FACTS BELOW.	6
III. THE GOVERNMENT'S CRITICISM OF THE LOWER COURT'S JUDGMENT DOES NOT SUPPORT REVIEW.	9
CERTIFICATE OF SERVICE	10

LIST OF AUTHORITIES

CASES	Page
California Motor Trucking Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972)	3, 6
City of Lafayette v. Louisiana Light & Power Co., 435 U.S. 389, 414-15 (1978)	4
Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982)	4
Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 275 (1949)	9
Merto Cable Co. v. CATV of Rockford, Inc., 517 F.2d 220 (7th Cir. 1975)	1, 2
Pumpkin Air, Inc. v. City of Addison, 608 F. Supp. 787 (N.D. Tex. 1985)	3
Rogers v. Lodge, 458 U.S. 613, 623 (1982)	9
Ross v. Moffitt, 417 U.S. 600, 616-17 (1974)	10
United Mine Workers v. Pennington, 381 U.S. 657, 671 (1965)	3
United States v. Johnston, 268 U.S. 220, 227 (1925)	9

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I. THE BRIEF OF THE UNITED STATES CORRECTLY URGES THE COURT TO DECLINE REVIEW.

A. There Is No Split in the Circuits.

The United States agrees that the law expressed in the decision below does not conflict with *Metro Cable Co. v. CATV of Rockford, Inc.*, 517 F.2d 220 (7th Cir. 1975). After all, the *Noerr-Pennington* test articulated by this district court and adopted by the Fifth Circuit explicitly recognizes that "valid governmental action which was induced by" efforts of private parties is

"shielded by *Noerr-Pennington* immunity."[1] In *Metro Cable* the plaintiff complained simply that the city council did not vote for it. It offered no proof of an agreement between private applicants for franchises not to compete with each other, much less evidence of any participation in such a conspiracy by a local official. The Seventh Circuit's conclusion that a legislative act alone does not prove conspiracy is consistent with the Fifth Circuit's limit on *Noerr* where a jury finds participation by a governmental official in a conspiracy between private persons. As a result, in its brief the government cannot say that the Fifth Circuit would have disposed of *Metro Cable* any differently than did the Seventh Circuit.[2]

B. No Important Policy Justifies Review.

1. *The ruling has limited applicability.* The government correctly observes that this is the first case to rest liability in part on the fact that government officials actively participated in a conspiracy to restrain trade.[3] Petitioner responds that numerous courts have referred to the co-conspirator exception.[4] The fact that so many courts have considered the co-conspirator exception and found it inapplicable to their facts indicates that they have had little difficulty understanding its narrow scope.

So petitioner must claim that unsuccessful allegations concerning official participation in antitrust violation have

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1. Pet. App. at A-123-24.

2. Brief of Amicus Curiae at 12.

3. Brief of Amicus Curiae at 12. The co-conspirator exception accounts only in part for the treatment of *Noerr-Pennington* in the instant case. See the court of appeals' treatment of the sham exception. Pet. App. A-24-25.

4. Supplemental Brief for Petitioner at 3.

caused "substantial mischief" by generating "many motions, and trials." This alarm is ill-founded.[5] The fact that plaintiffs in some twenty reported cases over twenty years have failed to prove official participation in anticompetitive conspiracies should not counsel elimination of this doctrine any more than it would any legal doctrine based on important federal legislation and strong public policies. After all, more mischief surely would result from a catagorical declaration that private parties desiring not to compete for public contracts can conspire at will simply by letting a government official secretly share in the action.[6] Despite the fact that no public purpose requires immunity for anticompetitive private conduct inducing unlawful action by a government official, immunity for such conduct would follow abolition of a co-conspirator exception to *Noerr-Pennington*. No doubt that explains why this Court has been careful not to extend *Noerr* to cases involving official misconduct.[7]

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5. Petitioner is not aware of and can find no evidence of any trials besides this, much less "many" trials, which have encompassed the issue of the co-conspirator exception.

6. The record in the only case relying on the court of appeals' decision to deny summary judgment, *Pumpkin Air, Inc v. City of Addison*, 608 F. Supp. 787 (N.D. Tex. 1985), amply illustrates the necessity of a co-conspirator exception of some sort. In that case plaintiffs alleged and obtained deposition testimony that the mayor of a small town received secret cash payments from the operator of a local airport, and proceeded to obtain large FAA grants for the airport in the City's name and assist the operator in illegal activity to exclude all competitors for the sale of fuel at that airport. *See* Class Plaintiff's Response to Motion for Summary Judgment, filed December 31, 1984, C.A. No. 3-82-1135-F (N.D. Tex.).

7. *California Motor Trucking Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972). *Cf. United Mine Workers v. Pennington*, 381 U.S. 657, 671 (1965) (noting that plaintiff complained of "an act of a public official who is not claimed to be a co-conspirator.")

2. *Congress recently refused to immunize the conduct in this case.* The United States is certainly correct that Congress already has extensively reviewed and addressed issues arising from municipal liability and antitrust, including this case.[8] Congress could have altered the result in this case, and it declined to do so. This Court is reluctant to expand immunities to the antitrust law. *See, e.g., City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 397-99 (1978). It should be particularly disinclined to do so when Congress itself has recently passed judgment on the issue.

3. *The decision below does not frustrate important public policies.* Neither the government nor even petitioner claims that any antitrust or broader public interest would be served by encouraging the actions challenged in this case. Petitioner can only argue that courts will reach too far, chilling genuine political activity and increasing the litigation expenses of municipalities. This Court should give no more credence to this parade of horribles than did Congress. It takes no legal genius to discern, as does the United States, that this case involves "unusual" facts about a private scheme to rig the bids for a franchise while cutting a public official's creditor in on the action to smooth the scheme's success. Penalizing that conduct threatens no important first amendment interest of political expression. If this Court's *Boulder*[9] decision has any force, it must allow the law to reach this type of anticompetitive behavior.

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8. *See* Brief in Response to Petition at 17.

9. *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982).

4. *Review would delay justice and encourage relitigation of facts on appeal.* Not only did the lower court's decision serve the interest of the antitrust laws, but plaintiffs deserve a reasonable end to litigation when they have successfully vindicated important public interests in free competition. Petitioner complains that the co-conspirator exception encourages many motions and trials. Respondent sympathizes with at least the object of the complaint: plaintiff is without a judgment three years and nine months since a jury verdict on which an overwhelming majority of the judges on the Fifth Circuit agree that judgment should have been entered. Those judges have had the opportunity to review the record in its entirety. Of course, the district court also fully instructed the jury on the *Noerr-Pennington* doctrine, and the jury considered the evidence in that light. If this Court undertook review, and reviewed the evidence to disagree with the court of appeals' application of the law to the facts concerning the local official's participation in the conspiracy, it would have to remand for yet another Fifth Circuit decision on the sham exception and the applicability of the per se rule to territorial market division. That, in turn, could extend the litigation for several more years. Already plaintiff has had to incur almost a million dollars in legal fees, much of it in extensive appeals and post-verdict briefing. Defendant has been encouraged to prolong this litigation since nowhere can it borrow money at the rates at which post-judgment interest accrues. Accepting certiorari in this case will not reduce congestion of the courts as petitioner urges, but instead will encourage numerous appeals by litigants attempting to relitigate application of law to the facts even before the highest Court of law.

II. THE UNITED STATES INCORRECTLY CRITICIZES APPLICATION OF THE LAW TO THE FACTS BELOW.

The United States acknowledges that unreasonable restraints of trade do not become lawful merely because "they require government approval, or acquiescence, in order to take effect."[10] The United States does not contest that "[c]onspiracy with a licensing authority to eliminate a competitor may also result in antitrust transgression."[11] Finally, the United States does not disagree with or even question the lower courts' careful test for determining whether the participation of government in an anticompetitive scheme extends to private parties a privilege against antitrust liability.[12]

Instead, the United States gratuitously opines that the district court, a panel of the Fifth Circuit, and a lopsided majority of the Fifth Circuit *en banc* incorrectly applied the law to the facts of this case. It rests its analysis on an odd characterization of the challenged conduct as being "indistinguishable from the give and take of municipal politics in much of America."[13] The government offers this conclusion while acknowledging two pages later that "the facts of this case . . . are unusual,"[14]

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10. Brief of Amicus Curiae at 10.

11. *California Motor Trucking Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972).

12. *See* the district court's test, adopted by both the Fifth Circuit's panels, at Pet. App. A-123-24, quoted in Respondent's Brief at 4-5.

13. Brief of Amicus Curiae at 9.

14. *Id.* at 11.

and while disregarding evidence in the record that the franchising process at issue here was highly unusual.[15]

The government adopts the theory recently advanced by petitioner that politics accounted for plaintiff's injury. From three weeks of testimony, however, neither petitioner nor the government can cite to testimony that traditional political activity had anything to do with the award of franchises.[16] At trial, though obviously not on appeal, petitioner argued that it obtained a franchise based on the merits of its franchise application. When witness after witness contradicted this position, which accounted for the length of the trial, the jury did not believe that story. The record contains no evidence of any public announcement or mandate that a handful of applicants for franchises should agree not to compete on the merits of their franchise applications. Although the court of appeals painted with a broad brush when indicating that the mayor wanted certain applicants to cooperate, the actual record noted in more detail by the lower courts shows that many city officials, much less potential competitors or the public, were never told of this procedure.[17]

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15. *See* Pet. App. at 52-53 (referring to expert testimony concerning the franchising experiences of other cities).

16. See discussion at Response to Petition at 12-13.

17. *See* court of appeal's opinion n.5, Pet. App. A-10-15; district court opinion, Pet. App. A-76-86. The Court of Appeals *en banc* cited one page of the record saying that the conspirators excluded others at the mayor's "behest." Pet. App. A-15. Other than meetings with the conspirators in which the mayor advanced the cause of his creditor, there was never any evidence that this occurred. Though Mayor Jim McConn surely may have discussed the matter in private, a refusal to compete for franchises did not occur by official direction. The City received a package submitted as a *fait accompli*.

The private conspirators needed no encouragement. Indeed, evidence cited by the courts below shows that private applicants for franchises agreed not to compete on terms and conditions of services, agreed not to compete for territories, and agreed to offer the creditor of the mayor a piece of the action if they could then veto the applications of others. In short, plaintiff below complained of far more than what the government calls "the legislative franchising process itself." If, indeed, the trial had revealed any evidence that private applicants somehow were compelled to conspire by government action, petitioner would have asserted that as a successful defense under *Parker v. Brown* and *Goldfarb*.

Part of the government's mischaracterization of the record results from its refusal to consider evidence of market division by private franchise applicants, despite the relevance of this evidence to their intent to exclude competition.[18] The fact that the jury stumbled on an awkwardly-worded interrogatory to them on "boundary agreements," which plaintiff objected to, does not diminish the force of this evidence of market division concerning the conspiracy of private applicants to limit competition between themselves and from outsiders.[19]

18. *See* Pet. App. at A-19.

19. The court of appeals explained how the jury interrogatory concerning boundary agreements apparently confused the jury. Pet. App. at A-17. The district court never asked the jury whether defendants restrained trade by agreeing not to compete for the same or overlapping territories.

III. THE GOVERNMENT'S CRITICISM OF THE LOWER COURT'S JUDGMENT DOES NOT SUPPORT REVIEW.

For the reasons set forth above, the United States' disagreement with the lower courts' application of law to the facts rests on the government's somewhat mistaken characterization of those facts. However, even should this Court be inclined to give more credence to the government's judgment concerning application of law to facts than to the judgment of three lower courts below, this Court should not grant review. "A court of law, such as this court is, rather than a court for correction of errors in factfinding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949).[20] This Court does "not grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Moreover, since a matter of the application of law to facts only affects the outcome of a particular case, the Court should not grant certiorari. "This court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judg-

20. *Accord, Rogers v. Lodge*, 458 U.S. 613, 623 (1982) (declining to reexamine lower court's finding of discriminatory intent, which usually requires legal characterizations of evidence). This principle should apply with even greater force when a court of appeals has twice reviewed the record, once *en banc*.

ment we are asked to review." *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974).

Respectfully submitted,

WILLIAM H. WHITE
(Counsel of Record)
STEPHEN D. SUSMAN
MARK L. D. WAWRO
SUSMAN, GODFREY & MCGOWAN
2400 Allied Bank Plaza
Houston, Texas 77002
713/651-9366

Attorneys for Respondent,
Affiliated Capital Corporation.

CERTIFICATE OF SERVICE

This is certify that on this the 30th day of December, 1985, three true and correct copies of the foregoing document were forwarded to counsel of record by first class mail.

WILLIAM H. WHITE